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No. 78-488

IN THE

Supreme Court of the United States

October Term, 1978

UNITED STATES OF AMERICA,

Petitioner

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, and BENEDICT F. PASTORINI, et al., SOUTHEASTERN PENNSYLVANIA SYNOD OF THE LUTHERAN CHURCH IN AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 576 F. 2d 983. The opinion of the district court denying the motion for a new trial (Pet. App. 64a-75a) is not reported. The opinion of the court of appeals in the interlocutory appeal (Pet. App. 76a-87a) is reported at 506 F. 2d 796.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U. S. C. § 1254(1) (1976).

COUNTERSTATEMENT OF QUESTION PRESENTED

When property owned by a non-profit corporation devoted to the use of others for public, charitable, religious or educational purposes is condemned, and when an award based on market value will not permit the preservation of such use, does the just compensation clause of the fifth amendment require that the property owner receive an award based on the cost of substitute facilities?

CONSTITUTIONAL PROVISION INVOKED

The fifth amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

COUNTERSTATEMENT

A. The Property and the Camping Program

The property at issue—owned by respondent Southeastern Pennsylvania Synod of the Lutheran Church in America (the "Synod"), a Pennsylvania non-profit corporation—consisted of approximately 304 acres situated on the bank of the Delaware River in northeastern Pennsylvania (A. 18-20, 23-28, 70). At the time of the taking, June 15, 1970, and for more than twenty years before, the property, and the improvements thereon, were devoted to

an extensive non-profit camping program (A. 73, 92, 95, 99-105).[1]

Generally the campers in the program came from modest or underprivileged backgrounds (A. 128). This fact is reflected in the availability of scholarships for underprivileged children and the modest fees charged the other campers (A. 115-16).[2] The camping population in the Synod program was racially and religiously mixed and was drawn from inner city, as well as rural, areas (A. 71-73, 91). Admission was determined strictly on a "first-come, first-serve basis" (A. 113). The program also included children with severe emotional problems and physical handicaps (A. 114-15).

The principal activities in the Synod camping program were the same as those at private camps—sports, swimming, fishing, boating, nature and arts and crafts (A. 109-12). In addition, the Synod designed special programs to meet the particular needs of emotionally disturbed and physically handicapped campers (A. 114-15). While the Synod did schedule a small portion of each week for devotional exercises and religious instruction (A. 120), the goal of the Synod camping program was to teach children from diverse backgrounds to live together (A. 91, 104, 123, 134).

The Synod camping program was operated as one unit except in terms of scheduling and accommodations, for which the property was divided into three camps (A. 108). Camp Miller, consisting of approximately 82 acres, was operated since the mid-1920's and had about 1,450

1. The camping program first began in the 1920's with the purchase of 82 acres (A. 35). It was not until the mid-1940's, however, that all the property involved herein had been acquired by the Synod (A. 36).

2. The standard fee charged to attend the Synod camp was less than 50% of that charged by private-for-profit camps in the area (A. 128).

male campers per summer (A. 35-36). Camp Hagan, consisting of approximately 40 acres, was operated since 1937 as Camp Miller's sister camp and had about 1,400 female campers per summer (A. 36). Camp Ministerium, consisting of approximately 184 acres, began operating in the early 1950's for family camping (A. 36, 104). When the improvements to the property were completed in 1959, Camp Ministerium was operated as the co-educational equivalent of Camps Miller and Hagan (A. 104).

B. The Taking and the Search for Other Facilities

Although the formal taking did not occur until June 15, 1970, this impending development had been obvious for some time before, especially after the promulgation of the Delaware River Basin Compact in September, 1961. *See* Pub. L. No. 87-328, 75 Stat. 688-89, 711 (1961).[3] Accordingly, the Synod formed a search committee and, to aid in this effort to find another camp, employed a professional consultant (A. 92-93, 158). This search proved wholly unsuccessful.[4] In an effort to protect the future of its camping program, the Synod purchased unimproved property in the Pocono Mountains outside the proposed Tocks Island dam area, but near the threatened property (A. 93), so that when the taking occurred it could build facilities that would enable it to continue its camping program (A. 161).[5]

3. The property was taken for use as part of the Tocks Island Reservoir project. Pub. L. No. 89-158, 79 Stat. 612 (1965), 16 U. S. C. §§ 460o-460o-7 (1965). This project subsequently was aborted and the condemned property recently was designated by Congress as a component of the national wild and scenic rivers system. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, § 705, 92 Stat. 3467, 3527 (to be codified in 16 U. S. C. § 1274(20)).

4. In fact, the search committee could not even find an unimproved site that had river frontage or frontage on a lake that did not pose pollution problems (A. 158).

5. After the taking, the Synod continued to operate Camps Hagan and Ministerium through a leaseback arrangement with the

The central aspect of this case is that the Synod's camping program will be eliminated if the award for the property taken by petitioner is based on its market value. As testified to at trial, the cost of building functionally equivalent facilities, excluding the cost of the land,[6] would be $4,361,633[7] (A. 148-53). This includes the cost of complying with various environmental and building regulations from which the Synod previously had been exempt (A. 147-48; R. 366-67).

C. The Court Proceedings

Before trial, a ruling was sought on whether evidence of the cost of substitute facilities would be admissible. On January 15, 1974, the trial court held that the substitute facilities doctrine was limited to governmental condemnees (A. 38-49). The Synod then sought successfully to take an interlocutory appeal pursuant to 28 U. S. C. § 1292(b) (1976). In the interlocutory appeal, the Third Circuit reversed the trial court's ruling, concluding

> that the substitution of facilities measure of fair compensation is available to private owners of non-profit community facilities as well as to public owners of such facilities, in appropriate cases.

5. (Cont'd.)
government (A. 70). Since Camp Miller was extensively vandalized after the taking, the Synod was unable to enter into a similar arrangement for its use (A. 107).

6. The Synod purchased approximately 3,800 acres of land at a cost of less than $100 per acre (A. 93, 160). The cost of any such new land over and above that which is necessary for functionally equivalent facilities is not part of the Synod's claim.

7. The $4,361,633 figure was not contradicted by petitioner at trial even though one of its expert witnesses had been "asked to make an evaluation of the three existing sites [Camps Miller, Hagan and Ministerium] and to prepare a cost estimate for a functionally equivalent substitute camp" (R. 306).

(Pet. App. 87a). The court did not, however, express any opinion on whether the substitute facilities doctrine would be appropriate in this case and remanded the matter to the trial court (Pet. App. 87a).

On remand, the trial was bifurcated. The issue in the first phase was whether the substitute facilities measure of compensation was available to the Synod. After instructing the jury, the trial court submitted a special interrogatory to the jury asking "does the doctrine of substitute facilities apply?" (A. 170). The jury determined that it did not (A. 171). The trial then proceeded to the second phase during which market value was determined to be $740,000 without reference to the cost of substitute facilities (A. 172).

On appeal, the Third Circuit reversed on the grounds that (i) the trial judge had inadequately instructed the jury on the law and (ii) the government had misstated the law to the jury in closing argument (Pet. App. 1a-28a). As a result, the Third Circuit remanded the case for a new trial in accordance with the more specific standards it set forth for determining the applicability of the substitute facilities doctrine.

The judgment of the Third Circuit was entered on March 27, 1978 (Pet. App. 88a-89a), and the government's petition for rehearing was denied on May 24, 1978 (Pet. App. 90a-91a). The government's petition for a writ of certiorari was granted by this Court on November 27, 1978 (A. 173).

SUMMARY OF ARGUMENT

I.

The just compensation clause of the fifth amendment is guided by the principle of indemnity, requiring that a property owner be made whole, and is based on fundamental considerations of fairness and equity. Thus, this Court has refused to make a fetish of market value in fulfilling the mandate of the just compensation clause and has attempted to fashion practical rules that will do substantial justice.

In the present case, it is undisputed that resort to the market value test will eliminate the Synod's use of the property as a non-profit camp for children and teenagers of modest or underprivileged means and diverse backgrounds. Under these circumstances, the court of appeals was correct in holding that the functionally equivalent substitute facilities doctrine—a doctrine that petitioner concedes is applicable to governmental condemnees—is available to the Synod as the correct and constitutionally mandated method of determining just compensation.

The heart of petitioner's argument is that the decision of the court of appeals will permit the Synod to recover what petitioner refers to as consequential damages. Aside from the inconsistency of this argument in light of petitioner's concession that just compensation for governmental condemnees includes the same measure of recovery correctly sought by the Synod, petitioner also fails to understand the meaning of the term consequential damages.

A. The term consequential damages is used by courts to delineate the point at which damages are considered too speculative, remote or incidental. In so limiting damages, this Court has been careful not to sanction a

result that would create a wide disparity between the market value of the property and the undisputed loss to the property owner.

The real value of the property in the instant case is in its use, not its status in the marketplace or the earnings it might produce if commercially employed. Petitioner concedes that the market value of the Synod's property is wholly insufficient to enable the Synod to continue the use of the property (R. 170). The damages here are not speculative, remote or incidental. In this situation, the functionally equivalent substitute facilities doctrine is a well-settled approach for determining just compensation.

B-C. The functionally equivalent substitute facilities doctrine is an express recognition that the real value of some property is in its use and that when market value is wholly inadequate to preserve that use, an award of just compensation must be determined by the cost of functionally equivalent substitute facilities. This approach was first widely used to determine just compensation in connection with the taking of streets and highways having a negligible monetary value to the governmental property owner but a high value in use. It subsequently was used to determine just compensation in connection with the taking of schools, playgrounds and recreational buildings, properties that have a definite market value.

The court of appeals in the instant case refused to accept the distinction urged by petitioner, there as well as here, between governmental and non-profit non-governmental condemnees. The court held that "[i]n view of the express reference to *private* property [in the fifth amendment] and the absence of any reference to public property, it is inconceivable that the framers of the amendment intended to impose a greater obligation of indemnification on the national government toward the states and their

subdivisions" (Pet. App. 85a) (emphasis in original). In rejecting this distinction, the court of appeals recognized that just compensation for a governmental condemnee should mean no more than just compensation for a non-governmental condemnee, at least when the property at issue is fully devoted to a public, charitable, religious or educational non-profit use. In either case the utility is similar and may be identical. In either case the property is held for the use of others—not the use of the property owner.

Subsequently, the court of appeals set down three conditions that the Synod must satisfy before the cost of functionally equivalent substitute facilities can be awarded. First, the property must not be operated for monetary profit (Pet. App. 10a-13a). This condition can be satisfied by the Synod. Second, it must be shown that after "exercising reasonable diligence," the property owner could not "have purchased a functionally equivalent replacement at a cost roughly equal to the fair market value of the taken facility during a reasonable time after notice of condemnation" (Pet. App. 18a-19a) (footnotes omitted). This condition can be satisfied by the Synod. Finally, the court of appeals explained that the third condition—reasonably necessary to public welfare—has two aspects: (i) the property "provide[s] a benefit to the community or [is] rationally related to the public welfare" and (ii) "the condemnor must not have eliminated the need or purpose which the condemned facility served" (Pet. App. 25a-26a) (footnotes omitted). Both aspects of this condition can be satisfied by the Synod.

In addition, petitioner's contention that the first aspect of the third condition "invites exceptionally free value judgments" (Brief of Pet., p. 19) is incorrect. This aspect does not invite a third party observer to make value judg-

ments and should not be so construed. It requires the Synod to show by a preponderance of the evidence that the property at issue was devoted to a public, charitable, religious or educational purpose, and was fully used at the time of taking.

D. Application of the substitute facilities doctrine will not result in a windfall to the Synod. The Synod is not claiming that it is entitled to an award equal to the exact cost of functionally equivalent substitute facilities. If such new facilities will result in maintenance and capital savings, the Synod concedes that such savings should be discounted from the compensation award. Further, the facts in this specific case belie any notion that the Synod would use the proceeds of a just compensation award for a purpose other than building functionally equivalent substitute facilities. In the event a safeguard is deemed necessary, the full amount of the award could be paid out over the course of the construction project.

II.

Religion is not an issue here. The Synod is asking to be treated in the same manner as a similarly situated secular non-profit condemnee and in the same manner that petitioner concedes is applicable to governmental condemnees. In this light, the establishment clause of the first amendment is not implicated. In fact, to deny the Synod equal treatment would raise a very troublesome question under the free exercise clause of the first amendment.

The Synod is not asking for sponsorship or financial support. It is not asking for active involvement of the sovereign in religious activity. It seeks only equal, not preferential, treatment.

ARGUMENT

I. JUST COMPENSATION REQUIRES THAT THE SYNOD RECEIVE AN AWARD IN AN AMOUNT EQUAL TO THE COST OF FUNCTIONALLY EQUIVALENT SUBSTITUTE FACILITIES

The just compensation clause of the fifth amendment providing that "private property [cannot] be taken for public use, without just compensation"—like justice itself—embodies a range of fundamental considerations that cannot be expressed in a tidy phrase or a simple formula. The clause evokes more than simply "what a willing buyer would pay in cash to a willing seller" in a hypothetical marketplace. *United States v. Miller*, 317 U. S. 369, 374 (1943). It "evokes [basic] ideas of 'fairness' and 'equity,'" *United States v. Commodities Trading Corp.*, 339 U. S. 121, 124 (1950), and is guided by the broad principle of indemnification that a property owner "must be made whole"—neither more nor less. *United States v. Virginia Electric & Power Co.*, 365 U. S. 624, 633 (1961) (quoting *Olson v. United States*, 292 U. S. 246, 255 (1934)); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U. S. 470, 478 (1973). *See* Note, *The Substitute Facilities Measure of Just Compensation: A Cautionary Remark*, 62 Iowa L. Rev. 1158, 1164 (1977). In determining the appropriate amount of compensation, "the question is what has the owner lost." *Kimball Laundry Co. v. United States*, 338 U. S. 1, 13 (1949) (quoting Mr. Justice Holmes in *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195 (1910)). In recognition of these ideas and this guiding principle, this Court "has been careful not to reduce the concept of 'just compensation' to a formula" and has "endeavor[ed] to find working rules that will do substantial justice." *United States v. Cors*, 337 U. S. 325, 332 (1949). As a result, this Court has refused to make a "fetish" of

market value in determining just compensation, *id.* at 332, and is not wedded to "inexorable rules." *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396, 402 (1949).

To read just compensation to mean rigid adherence to the monetary equivalent of market value, as petitioner does, is to dismiss history and to frustrate the guarantee made to a property owner by a clause specifically designed to protect against the enormity of the State's power to condemn and expropriate. The power of the sovereign to take property by edict is an awesome power, fraught with great potential for abuse. Recognizing the danger of granting the sovereign this power, the Founding Fathers restricted its exercise by providing in the Bill of Rights that no person could be deprived of his "property without due process of law" or "without just compensation." As Mr. Justice Brewer stated over eighty-five years ago:

> Obviously, this question [how much the government must pay as just compensation], as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.

Monongahela Navigation Co. v. United States, 148 U. S. 312, 324 (1893).

The present case posits the rare situation in which, as a result of special circumstances, the sole use of the property as a non-profit camp for children and teenagers cannot be preserved if just compensation is determined by the market value method. This, then, is not a case in which the property owner and the government are at odds over

whether certain damages—referred to variously as speculative, incidental or consequential—are constitutionally required under the just compensation clause. Nor is it a case in which compensation determined by market value even roughly approaches making the property owner whole. The issue here is much more basic: can the full non-profit use of this property as a camp for children and teenagers of modest or underprivileged backgrounds be destroyed, with no amend from the sovereign, by the device of condemnation? No prior decision of this Court, nor any principle set forth in any such decision, suggests so harsh a result. On the contrary, under the principles heretofore articulated by this Court, by lower courts and by scholars in the field, the mandate of just compensation entitles the Synod to an award based on the cost of facilities that are the functional equivalent of, although not necessarily identical to, the facilities taken by petitioner. Further, it is totally inequitable to suggest, as petitioner does, that such non-profit use can be dismissed by labeling it as consequential damages. Yet, since this is the core of petitioner's argument, it will be dealt with first.

A. The Term Consequential Damages Refers to Incidental or Speculative Damages and Is Not a Reason to Refuse to Make a Property Owner Whole.

Petitioner wholly misconceives the meaning of consequential damages. This term is utilized by the courts to delineate the point at which the damages sought by the property owner are too speculative or incidental. Even then, it fails to provide any real guidance:

> The term "consequential damages" in [sic] ambiguous in character and is not truly relevant to any discussion respecting different classes of damage. In the

> proper sense of the term all damages must of necessity be consequential, since all damage is the consequence of an injurious act. Use of the term introduces an equivocation which is fatal to any hope of a clear settlement of the question. It means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes it is used to denote damage which, though actionable, does not follow in point of time upon the doing of the act complained of. It has been characterized as consequential damage to the actionable degree. The distinction seems to be between less and more remote damage and, in the last analysis, seems to be purely a matter of degree.

2A *Nichols on Eminent Domain* § 6.4432[1], at 6-171 (rev. 3d ed. 1976). *See, e.g.,*[8] *United States v. Westinghouse Electric & Manufacturing Co.*, 339 U. S. 261 (1950) (consequential damages, including removal or relocation costs, when entire leasehold interest taken—not compensable); *United States v. Commodities Trading Corp.*, 339 U .S. 121 (1950) (possible loss of profits because owner not permitted to wait for sale at more profitable price—not compensable); *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396 (1949) (possible loss of profits from sale in remote market not shown to be reasonably likely—not compensable); *United States ex rel. TVA v. Powelson*, 319 U. S. 266 (1943) (possible loss of profits from conceivable business venture—not compensable); *Olson v. United States*, 292 U. S. 246 (1934) (possible loss of profits from business venture not shown to be reasonably probable—not compensable); *Mitchell v. United States*, 267 U. S. 341 (1925) (loss of profits due to destruction of business—not compensable).[9] *But see, e.g., Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U. S. 470 (1973) (possible profits from potential lease renewal—compensated); *Kimball Laundry Co. v. United States*, 338 U. S. 1 (1949) (consequential damages, including loss of going-concern value, resulting from short-term taking—compensated); *United States v. General Motors Corp.*, 323 U. S. 373 (1945) (consequential damages, including removal, storage and return, when part of leasehold interest taken—compensated); *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893) (loss of profits due to destruction of business—compensated); *United States v. 1,380.09 Acres of Land*, 574 F. 2d 238, 241 (5th Cir. 1978), *petition for cert. filed*, 47 U. S. L. W. 3373 (U. S. Nov. 28, 1978) (No. 78-551) ("[i]n determining just compensation in condemnation cases, our central concern is to do justice;" appraisal fees incurred to demonstrate unfairness of price offered by government—compensated); *United States v. Certain Parcels of Land in Cattaraugus County*, 327 F. Supp. 181 (W. D. N. Y.), *aff'd*, 443 F. 2d 375 (2d Cir. 1970) (and cases cited therein) (loss of tax exemption—compensated).

Petitioner places primary reliance on cases involving business property that limit the recovery of consequential damages, but petitioner fails to acknowledge that in those cases the result reached approximated making the property owner whole. In fact, this Court explicitly has recog-

8. Even when just compensation is determined by the cost of substitute facilities, speculative costs are not included in the award. *See, e.g., United States v. Streets, Alleys & Public Ways*, 531 F. 2d 882, 887 (8th Cir. 1976).

9. *Mitchell* is *sui generis*. There it was undisputed that the property owner could not find other land with the soil needed for growning corn of a "special grade and quality." *Id.* at 343. Even though this Court denied the property owner's claim for business losses incurred as a result of the taking, this Court specifically stated that the property owner was entitled under the fifth amendment to take into account "[t]he special value of [the] land due to its adaptability for use in a particular business. . . ." *Id.* at 344.

nized that the award or denial of consequential damages rests on a consideration of what the property owner has lost and, thus, what is necessary to approximate making him whole. *Kimball Laundry Co. v. United States, supra,* 338 U. S. at 13. Illustrative of this recognition is the differing treatment that this Court has accorded going-concern value. When a taking of business property eliminates the going-concern value of the business, going-concern value is compensable under the just compensation clause. *Id.* at 13. *Cf. United States v. General Motors Corp., supra.* On the other hand, when the owner retains the going-concern value, the value is deemed a consequential damage and is not taken into account in determining the owner's compensation because the compensation received for the property under the market value test will enable the owner to acquire replacement property and make use of the going-concern value that he retained. *Rochester Urban Renewal Agency v. Patchen Post, Inc.,* 45 N. Y. 2d 1, 379 N. E. 2d 169, 171, 407 N. Y. S. 2d 641, 644 (1978). *See also* Note, *The Substitute Facilities Measure of Just Compensation: A Cautionary Remark, supra,* 62 Iowa L. Rev. at 1164.

Most importantly, with regard to non-profit property of the type at issue in the present case, the term consequential damages provides no guidance whatsoever, for the property's chief value is in its use—not its status in the marketplace. The damages here cannot be excluded from consideration in determining just compensation on the ground that they are speculative and conjectural. The damages are real. They are not remote or incidental. They have been established by testimony in the record which stands unchallenged. Precluding consideration of the damages here by labeling them consequential would produce a tremendous disparity between what the property owner would receive and what the property owner needs to approximately preserve the use to which the property was devoted. Moreover, to dismiss this disparity as consequential damages, as petitioner does, gives rise to the "manifest injustice" deplored by this Court in *United States v. Commodities Trading Corp., supra,* 339 U. S. at 123. It is for this very reason that courts have invoked the substitute facilities doctrine of compensation.

B. The Functionally Equivalent Substitute Facilities Doctrine Is a Well Settled Approach to Just Compensation.

It is undisputed here that an award to the Synod based on the conventional market value approach would destroy the Synod camping program.[10] A situation such as this arises infrequently. It arises only when the real value of the condemned property is in the human use to which it is dedicated, a use which furthers public, charitable, religious or educational purposes and which cannot be quantified in dollars and cents by the market value test. In such cases, courts have awarded just compensation based on the cost of substitute facilities.

This Court approved the substitute facilities doctrine of indemnification in *Brown v. United States,* 263 U. S. 78 (1923). There the federal government condemned a town and this Court endorsed compensation by substitution as the best means of making the property owners whole:

> The usual and ordinary method of condemnation of the lots in the old town, and of the streets and alleys as town property, would be ill adapted to the exigency. It would be hard to fix a proper value of homes in a town thus to be destroyed without prospect of their owners' finding homes similarly situate

10. At trial, petitioner stipulated that the cost of building functionally equivalent facilities far exceeded the fair market value of the camps (R. 170).

> on streets in another part of the same town or in another town near at hand. It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not to be restored in kind. A town is a business center. It is a unit. If three-quarters of it is to be destroyed by appropriating it to an exclusive use like a reservior, all property owners, both those ousted and those in the remaining quarter, as well as the State, whose subordinate agency of government is the municipality, are injured. *A method of compensation by substitution would seem to be the best means of making the parties whole.*

Id. at 82-83 (emphasis added). By so stating, this Court recognized that the preservation of the use of the property condemned was a value requiring compensation by substitution to make all the property owners, individually and collectively, whole.

This doctrine for determining just compensation was first widely used in connection with the condemnation of streets and highways having a *de minimis* monetary value to the property owner but a high value in use. *See, e.g., United States v. Certain Lands Located in Townships of Raritan and Woodbridge,* 246 F. 2d 823 (3d Cir. 1957); *Washington v. United States,* 214 F. 2d 33 (9th Cir.), *cert. denied,* 348 U. S. 862 (1954); *City of Ft. Worth v. United States,* 188 F. 2d 217 (5th Cir. 1951); *Woodville v. United States,* 152 F. 2d 735 (10th Cir.), *cert. denied,* 328 U. S. 842 (1946); *Mayor and City Council of Baltimore v. United States,* 147 F. 2d 786 (4th Cir. 1945); *Jefferson County v. TVA,* 146 F. 2d 564 (6th Cir.), *cert. denied,* 324 U. S. 871 (1945). "Use of this principle in place of the conventional fair market value concept of determining compensation relieves public condemnees of hardships

they would otherwise face due to the absence of a market for streets and similar public facilities." *United States v. Streets, Alleys and Public Ways, supra,* 531 F. 2d at 885. Because the value of streets and highways is determined by their use, not in the marketplace, the courts first look to whether there is a need for substitute streets and highways. "If it is unnecessary to replace the roads or to provide substitutes for them, the [governmental property owners] have suffered no money loss and have been relieved of the burden of maintaining the roads taken." *United States v. Des Moines County,* 148 F. 2d 448, 449 (8th Cir.), *cert. denied,* 326 U. S. 743 (1945). In such circumstances, the substitute facilities doctrine is unavailable and market value is the basis of the award to the condemnee. *See, e.g., United States v. Certain Property in Borough of Manhattan,* 403 F. 2d 800, 804 n. 8 (2nd Cir. 1968). Conversely, when the use of the property should be preserved, just compensation includes all expenses reasonably required to provide the property owner with a functional equivalent.

Thus, for example, in *Town of Clarksville v. United States,* 198 F. 2d 238 (4th Cir. 1952), *cert. denied,* 344 U. S. 927 (1953), the United States was required to provide a substitute sewer system of equal utility to the one rendered useless by the construction of a dam. The old system had operated under an indefinite license that did not require the utilization of a sewage treatment plant. In contrast, the new facility was required to comply with pollution regulations mandating the installation of a sewage treatment plant. The court held that the property owner was entitled to a substitute sewer system that included the required sewage treatment plant.[11]

11. The court also held that the property owner was to be compensated for a reasonable period of time for the cost of operating and maintaining equipment that had been unnecessary under the old system.

> [W]e are not here dealing with a rigid, blind measure, that grants compensation only on a pound of flesh basis, but rather with an equitable concept of justice and fairness that accords with the Fifth Amendment's mandate. Accordingly, the equivalence requirement which must be met with respect to the substitute facility is more that of utility than of mere dollar and cents value.

Id. at 242-43. *See also United States v. 531.13 Acres of Land,* 244 F. Supp. 895 (W. D. S. C. 1965), *rev'd on other grounds,* 366 F. 2d 915 (4th Cir. 1966), *cert. denied,* 385 U. S. 1025 (1967) (a similar case involving a private property owner). *Cf. United States v. Wheeler Township,* 66 F. 2d 977 (8th Cir. 1933); *Town of Bedford v. United States,* 23 F. 2d 453 (1st Cir. 1927).

Further, the substitute facilities doctrine applies to the taking of facilities that have a definite market value [12] such as schools, playgrounds and public bath and recreation buildings. *See, e.g., United States v. Board of Education,* 253 F. 2d 760 (4th Cir. 1958) (school property); *United States v. Certain Land in Borough of Brooklyn,* 346 F. 2d 690 (2nd Cir. 1965) (playground facilities); *United States v. Certain Property in Borough of Manhattan,* 403 F. 2d 800 (2nd Cir. 1968) (public bath and recreation center).

12. As Judge Friendly has noted, courts often feel compelled when deviating from the strict market value approach to justify their action on the basis that the property has no market value, but this is largely a fiction:

> [W]here property with a high value for the use to which it is being put would have a much lower market value because of the paucity or absence of buyers for that use, the *courts consider value to the owner, sometimes finding it necessary to apologize for what is wrongly conceived to be a lapse from true doctrine by the rather obviously untrue statement that the property has "no" market value. . . .*

United States v. Certain Property Located in Borough of Manhattan, 306 F. 2d 439, 447 (2d Cir. 1962) (emphasis added).

In *United States v. Certain Land in Borough of Brooklyn, supra,* the Second Circuit, in providing for compensation by substitution in the case of a playground, stated:

> "The key notion [of just compensation] is indemnity, measured in money, for the owner's loss of the condemned property," Westchester County Park Comm'n v. United States, 143 F. 2d 688, 691 (2d Cir.), cert. denied, 323 U. S. 726, 65 S. Ct. 59, 89 L. Ed. 583 (1944), and we must be careful not "to translate a formula which produces fair results in many cases into a categorical imperative that must be applied regardless of consequences." United States v. Certain Property, 344 F. 2d 142, 146 (2d Cir. 1965). *Therefore, strict application of the market value rule of compensation will often be abandoned when the nature of the property or its uses produce a wide discrepancy between the value of the property to the owner and the price at which it could be sold to anyone else.* See 1 Orgel, § 37, at 173, cf. Spies & McCoid, Recovery of Consequential Damages in Eminent Domain, 48 Va. L. Rev. 437 (1962).

Id. at 694 (emphasis added). *Accord, United States v. Certain Property Located in Borough of Manhattan, supra,* 403 F. 2d at 802.

While most of the cases applying the substitute facilities doctrine have involved a governmental condemnee, the doctrine also has been utilized when there is a nongovernmental condemnee. *See, e.g., United States v. Two Acres of Land,* 144 F.2d 207 (7th Cir. 1944), *cert. granted,* 324 U. S. 833, *appeal dismissed,* 324 U. S. 884 (1945) (church); *United States v. 43.635 Acres of Land,* 183 F. Supp. 168 (W. D. Mo. 1960) (easement for electric power lines); *United States v. 531.13 Acres of Land,*

244 F. Supp. 895 (W. D. S. C. 1965), *rev'd on other grounds*, 366 F. 2d 915 (4th Cir. 1966), *cert. denied*, 385 U. S. 1025 (1967) (waste disposal system). *See also Brown v. United States, supra* (town).

United States v. 531.13 Acres of Land, supra, presented a situation similar to that in *Town of Clarksville v. United States, supra*, except that *531.13 Acres* involved a purely private property owner while *Town of Clarksville* involved a governmental owner. Nonetheless, the court in *531.13 Acres* refused to rely on such a distinction and held that the condemnor must provide the private owner with substitute facilities including a treatment plant that was required as part of a new waste disposal system but which was unnecessary under the old disposal system.

The Seventh Circuit has addressed the application of the functional equivalent doctrine to property held for a religious use, specifically to a church. *United States v. Two Acres of Land, supra.* In considering what constituted just compensation for the church, the court looked to replacement value:

> In the case of non-profit, religious or service properties, cost of replacement is regarded as cogent evidence of value although not in itself the only standard of compensation. But people do not go about buying and selling country churches. Such buildings have no established market values. *Consideration must be given to the elements actually involved and resort had to any evidence available, to prove value, such as the use made of the property and the right to enjoy it.*

Id. at 209 (emphasis added).

Here, especially in light of the circumstances of the case, the Synod, like the governmental and non-governmental condemnees discussed above, should receive the benefit of the substitute facilities doctrine, as is more fully discussed hereinafter.

C. The Third Circuit Was Correct in Holding That the Functionally Equivalent Substitute Facilities Doctrine Is Available to Non-Profit Condemnees.

The substitute facilities doctrine is an explicit recognition that the true value of some property is in its use and that when market value of the property is insufficient to preserve that use, the substitute facilities doctrine is the only approach that will give real meaning and an ethical foundation to the just compensation clause. In this regard, the doctrine is not used in conjunction with the market value approach to valuation, but as an alternative to it. *United States v. Certain Property in Borough of Manhattan, supra*, 403 F. 2d at 803.

As can be seen from the cases discussed, *supra* at 17-22, the substitute facilities doctrine has been applied principally to the taking of publicly used property when the price that the property would bring in the marketplace would be wholly inadequate to preserve its use. The considerations compelling the result in those cases—considerations with which petitioner does not take issue—apply with equal force to property devoted to public, charitable, religious or educational uses owned by the non-profit private sector. To reach an opposite result would be to deny the right of the public to perform community service through the non-profit sector. To recognize and preserve this right is to avoid "manifest injustice," *United States v. Commodities Trading Corp., supra*, 339 U. S. at 123, and is to make the non-profit property owner whole, as required under the just compensation clause.

Cognizant of these considerations, the Third Circuit in the interlocutory appeal, 506 F. 2d 796 (1974) (Pet.

App. 76a-87a) [hereinafter cited as *Acres I*], held that "single purpose facilities, operated not-for-profit for a religious or charitable purpose (and having no ready market)" may be entitled to substitute facilities treatment [13] (Pet. App. 79a). The Court pointed out that the distinction urged by the government, there as well as here, between governmental and non-governmental property owners could not be justified by a rational interpretation of the fifth amendment's taking clause:

> In view of the express reference to *private* property [in the fifth amendment] and the absence of any reference to public property, it is inconceivable that the framers of the amendment intended to impose a greater obligation of indemnification on the national government toward the states and their subdivisions than toward private owners. . . . Accepting the interpretation that it [the taking clause] protects the value of community uses, there is no basis for distinguishing between governmental and private community uses.

(Pet. App. 85a-86a) (emphasis in original).

In fact, in applying the just compensation clause, a distinction cannot be drawn between non-profit property

13. The result of the Third Circuit in *Acres I* follows the rule adopted by the National Conference of Commissioners on Uniform State Laws. Section 1004(b) of the Uniform Eminent Domain Code provides that the minimum just compensation for

> property owned by a public entity or other person organized and operated upon a nonprofit basis is deemed to be not less than the reasonable cost of functional replacement if the following conditions exist: (1) the property is devoted to and is needed by the owner in order to continue in good faith its actual use to perform a public function, or to render nonprofit educational, religious, charitable, or eleemosynary services; and (2) the facilities or services are available to the general public.

devoted to the use of others for public, charitable, religious or educational purposes, on the one hand, and, on the other, property owned by a local government agency devoted to its functions. In either case the utility is virtually indistinguishable and may be identical. In either case the property involved is held for the use of others—not the use of the property owner in whom title to the fee resides. Thus,

> [i]n terms of indemnity, it is difficult to see why a more favorable measure of compensation should be applied to a public school than to a parochial school or church . . . .

Level, *Evaluation of Special Purpose Properties in Condemnation Proceedings*, 3 Urb. Law. 428, 432 (1971). Unless the value provided by the non-profit sector can be summarily dismissed, the just compensation clause must surely guarantee the preservation of such use by assuring functionally equivalent facilities.[14]

The Third Circuit in *Acres I* did not address two issues that merit discussion here. First, the court did not artic-

14. Petitioner's suggestion that a governmental owner provides more fiscal safeguards than a non-profit non-governmental owner is unwarranted. The non-profit non-governmental owner, under the laws of the various states, is accountable on a daily basis—not just on election day. For instance, the Synod is fully accountable under the Pennsylvania Non-Profit Corporation Law of 1972 for any monies or property it presently has or will receive in the future. Such monies only may be used "for the purpose or purposes set forth in its articles" of incorporation. 15 Pa. C. S. § 7549(a) (1975). Moreover, property committed to such charitable purpose or purposes cannot be diverted by an amendment to the articles of incorporation unless permission is first obtained from a court pursuant to 15 Pa. C. S. § 7549(b) (1975). Indeed, not only are non-profit corporations strictly supervised, but their very assets are deemed "public property" for the specific purpose to which the property is devoted. *Mormon Church v. United States*, 136 U. S. 1, 59 (1890).

ulate the specific showing required of the Synod to prevail on its demand for substitute facilities. Second, the court did not address whether, if the Synod prevailed, it would receive the total cost of substitute facilities or that amount less a discount in the event that there are maintenance and capital savings. *See* discussion *infra* at 28.

The second Third Circuit opinion in the instant case, 576 F. 2d 983 (1978) (Pet. App. 1a-63a) [hereinafter *Acres II*], attempted to deal with the first of these issues and posed three conditions that the Synod must satisfy before the cost of substitute facilities may be awarded:

> (1) the property must be operated on a not-for-profit basis; (2) there must be no ready market for the particular type of property; and (3) the property, or facilities must be "reasonably necessary to the public welfare"

(Pet. App. 9a-10a). Continuing, the Court explained that "not-for-profit" referred to monetary profit (Pet. App. 10a-13a). The condition "no ready market" was defined to mean that after "exercising reasonable diligence," the owner could not "have purchased a functionally equivalent replacement at a cost roughly equal to the fair market value of the taken facility during a reasonable time after notice of condemnation" (Pet. App. 18a-19a) (footnotes omitted).

Finally, the court in *Acres II* explained that the third condition, "reasonably necessary to public welfare," has two aspects: (i) the property "provide[s] a benefit to the community or [is] rationally related to the public welfare" and (ii) "the condemnor must not have eliminated the need or purpose which the condemned facility served" (Pet. App. 25a-26a) (footnotes omitted). The court summarized these two aspects collectively to mean that a facility must "provide a benefit to the community that will not be as fully provided after the facility is taken" (Pet. App. 26a). Both aspects of this third condition can be satisfied by the Synod.

In satisfying the first aspect requiring proof of "community benefit," the Synod at trial should have to show by a preponderance of the evidence that the property at issue was devoted to a public, charitable, religious or educational purpose, and was fully used at the time of the taking.[15] Insofar as the Third Circuit decisions in *Acres I* and *Acres II* are read to require an even greater showing of "community benefit," the Synod would take issue with such an interpretation, particularly if it were based on a distinction between a non-profit secular purpose and a non-profit religious purpose. It is the Synod's position that the "community benefit" aspect means no more than its non-profit facilitity is fully used for public, charitable, religious or educational purposes, irrespective of the social value a third party observer might attribute to it. In satisfying the second aspect, the Synod must prove that the non-profit use will be extant and not have been eliminated by the new use made of the property by the condemnor. *See, e.g., Woodville v. United States, supra,* 152 F. 2d at 737 (no need for substitute facilities when condemnor flooded town and "[a]ll the residents . . . moved away").

In summary, the Third Circuit was correct in holding that the functionally equivalent substitute facilities doctrine is available to non-profit condemnees. No other award will furnish the Synod with an amount that will permit it to preserve the use of its camp facilities. Nor will

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15. In the event that the property was unused prior to the taking, the property owner would not be entitled to an award based on the cost of substitute facilities. *See, e.g., California v. United States,* 169 F. 2d 914 (9th Cir. 1948).

any lesser award comply with the constitutional guarantee of just compensation.

D. Application of the Functionally Equivalent Substitute Facilities Doctrine Does Not Result in a Windfall.

Petitioner, in reproving the Synod for seeking a windfall, fails to understand that the Synod is not claiming to be entitled to an award in an amount equal to the exact cost of building functionally equivalent facilities. The Synod recognizes that such new facilities may result in maintenance and capital savings. Such savings concededly do not belong to the Synod and should be discounted from any compensation award determined under the substitute facilities doctrine. The manner of fashioning such a discount should be addressed by the trial court. *Cf. United States v. Certain Property in Borough of Manhattan, supra,* 403 F. 2d at 804.

Application of the substitute facilities doctrine will not result in a windfall to the Synod. There is no reason to believe that the Synod, or any other similar non-profit property owner, would disingenously proclaim its desire to continue the use of its property. *See* Note, *Cost of Substitute Facilities As a Measure of Just Compensation When There Is a Private Condemnee,* 1975 Duke L. J. 1133, 1147. The record shows that the Synod bought land for the substitute facility in anticipation of the taking at a cost of about $321,000 (A. 93). This alone is an earnest of its good faith. Further, if an added precaution is thought necessary, the full amount of the award could be paid out over the course of the construction project. Pub. L. No. 71-736, 46 Stat. 1421 (1931), 40 U. S. C. § 258a (1976). *See* Note, *Just Compensation and the Public Condemnee,* 75 Yale L. J. 1053, 1058 (1966). The only other theoretical windfall would occur if, years later, there

were a sale of the functionally equivalent facilities because the use no longer could be perpetuated. It should be noted that the same possibility exists with respect to a governmental condemnee. More significantly, in the case of a non-profit condemnee the proceeds, as explained previously, cannot be diverted from its non-profit purpose.[16]

II. AN AWARD OF JUST COMPENSATION DOES NOT ESTABLISH RELIGION AND AWARDING LESS THAN JUST COMPENSATION WOULD IMPAIR ITS FREE EXERCISE

Religion is not an issue here. The Synod is in no different position than any other property owner seeking to be made whole under the just compensation clause. If this Court determines that awarding the cost of substitute facilities, under certain circumstances, to non-profit property owners is required by the just compensation clause, the establishment clause is not implicated. Indeed, to deny a non-profit religious property owner the same treatment accorded a similarly situated non-profit secular property owner would raise very troubling questions under the free exercise clause. *See, e.g.,* Note, *Cost of Substitute Facilities As a Measure of Just Compensation When There is a Private Condemnee, supra,* 1975 Duke L. J. at 1145 n. 55; Comment, *The Lord Buildeth and the State Taketh Away—Church Condemnation and the Religion Clauses of the First Amendment,* 46 U. Colo. L. Rev. 43 (1974).

The establishment clause, relied on by petitioner, prohibits the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Committee for Public Education v. Nyquist,* 413 U. S. 756, 772 (1973) (quoting *Walz v. Tax Commission,* 397 U. S. 664, 668 (1970)); *Levitt v. Committee for Public Education,*

16. As a practical matter, the windfall argument is exaggerated since the property at issue in these cases generally does not command much attention in the marketplace.

413 U. S. 472, 481 (1973). None of these elements is present here. By seeking just compensation for values expropriated by petitioner the Synod is not asking for government "sponsorship" or "financial support." It is asking for compensation and not for grants-in-aid. Petitioner's contention reduces to this absurdity: condemnation of a church is not compensable because a compensation award would sponsor or provide financial support for religion. Obviously such is not the law. The Synod asks for equal not preferential treatment and for the same award of just compensation for its camps in use as would be made to a city for its camps if condemned under similar circumstances. The Synod's position is *a fortiori* in respect of the language of *Walz v. Tax Commission*, 397 U. S. 664 (1970). The Synod does not distinguish itself, or religious organizations generally, from other non-profit property owners. As this Court said about New York and its tax exemption of churches:

> It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.

Id. at 672-73.

Nor does the case involve any form of "active involvement of the sovereign in religious activity." *Committee for Public Education v. Nyquist, supra*, 413 U. S.

at 772. The Synod has, indeed, welcomed the suggestion that the trial court might mold and monitor a substitution of facilities award so as to insure that it be used to create the substitute and, thus, to allay petitioner's fears and suspicions that the money might be diverted to other objectives. Surely such a molding or monitoring would be no more than a control of disbursements during construction and not an involvement in the affairs of the substitute facility after completion. It would involve the court in religion no more than the bank that might control the disbursements of a construction loan.

As for petitioner's fear that the community benefit test to which the Third Circuit adverted would involve the judiciary in the evaluation of religious elements, it need only be said that, properly understood in the light of the analysis set forth above in this brief, the test requires no such thing. It asks only that there be a community that enjoys the activities of a "non-profit, quasi-public corporation" [17] dedicated to public, charitable, religious or educational purposes. The courts need not assess the social value of the activities, be they religious or otherwise.

It is submitted that, if the first amendment is an issue here, it supports the Synod's case. In short, the Synod cannot as a non-profit, quasi-public corporation be denied the same justice of substitution of facilities that petitioner concedes is applicable to schools, playgrounds and recreational centers.

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17. These words come from *Walz v. Tax Commission*, 397 U. S. 664, 673 (1970), which includes churches with other non-profit corporations in the reference to "non-profit, quasi-public corporations."

III. CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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